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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE, Plaintiff and Respondent, v. CARL McCEE FOUNTAIN, Defendant and Appellant.	C028465 (Super. Ct. No. C10142)

APPEAL from a judgment of the Superior Court of Yuba County. James L. Curry, Judge. Reversed with directions.

Lori Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Robert R. Anderson, Senior Assistant Attorney General, Michael J. Weinberger

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II and III.

and Thomas Y. Shigemoto, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Carl McCee Fountain was convicted by a jury of lewd and lascivious conduct with a child under 14 years of age (Pen. Code, § 288, subd. (a) -- count I [hereafter all section references to an undesignated code are to the Penal Code]), first degree burglary (§§ 459, 460 -- count II), and furnishing alcohol to a minor (Bus. & Prof. Code, § 25658a -- count III). As to count I, the jury also found that defendant engaged in substantial sexual conduct with the victim (§ 1203.066, subd. (a)(8)), that he befriended the victim for the purpose violating section 288, and that he committed the section 288 violation in the course of committing a burglary (§ 667.61, subd. (d)(4)). In a trial by court, defendant was found to have two prior convictions which constituted strikes (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(e)), one for battery with serious bodily injury (§ 243, subd. (d)), incurred in juvenile proceedings, and the other in adult court for robbery (§ 211).

Sentenced to state prison for 80 years to life, defendant appeals contending the trial court erred by (1) finding his prior juvenile adjudication for violation of section 243, subdivision (d) was a strike; (2) admitting evidence of an uncharged offense; (3) using his prior juvenile adjudication as a strike denied him his right to a jury trial and due process; (4) imposing a term of 75 years to life on count I,

and (4) sentencing him under both sections 667.61 and 667. We find that only defendant's first contention has merit, and, therefore, we shall vacate the sentence and remand for further proceedings.

FACTS

In 1997, 13-year-old LeeAnn lived with her mother in an apartment next door to a bar where her mother worked. On April 1, LeeAnn was upset after breaking up with her boyfriend and went to the bar to talk with her mother. Her mother, who was busy with customers, spoke with LeeAnn for a few minutes and told her to go home.

Instead of going home, LeeAnn took a walk. As she walked, a convertible, driven by defendant, drove up beside her. Defendant told LeeAnn he thought she was someone else and then asked her why she was crying. She told him that she had just broken up with her boyfriend. Defendant told her that his name was "Carl," that he was having problems with his girlfriend, that today was his 21st birthday, and that he drank when he had problems. Defendant asked LeeAnn her age and she told him she was 13. He said she looked 17 or 18, but she repeated that she was 13. Defendant told LeeAnn he needed someone to have a drink with and she got into the car with him.

Defendant drove to J&J Liquors where he purchased a half-pint of vodka for her and a 40-ounce bottle of beer for himself. By questioning LeeAnn, defendant learned she lived

with her mother, and that no one was at her home. Defendant asked if they could go to her home and she replied "'Yes.'"

At LeeAnn's apartment she drank the vodka and he drank the beer. Although not sure, LeeAnn thought she "finished" the bottle of vodka. Defendant asked if she wanted more and she said she didn't think so. Defendant told her, "'Yeah, you need another bottle.'" Defendant helped LeeAnn get off the couch, she felt dizzy and had some trouble walking. As they again drove to J&J Liquors, LeeAnn told defendant she was "really feeling the effects of the vodka." He told her "that was good."

Defendant purchased another bottle of vodka and returned with LeeAnn to her apartment. LeeAnn had difficulty unlocking the door and defendant had to assist her. Inside the apartment, LeeAnn told defendant she felt "[v]ery dizzy, very sleepy." LeeAnn took one more drink of vodka and the next thing she recalled was defendant helping her off the couch and suggesting she would be more comfortable in the bedroom. Defendant guided LeeAnn into the bedroom where she "fell onto the bed."

Defendant removed her jeans and underwear. LeeAnn realized she was too intoxicated to stop defendant and asked if he was using a condom because "I didn't know this man and because I couldn't get him off of me."

While defendant was with LeeAnn, Jacquelyn Rogers, a coworker of LeeAnn's mother and a neighbor, left the bar to go home. Rogers saw defendant's car, with which she was

unfamiliar, in front of LeeAnn's apartment. Concerned, Rogers tried to call LeeAnn but received no response. Rogers then called LeeAnn's mother and told her of the vehicle. LeeAnn's mother asked Dennis Miller, a friend in the bar, to "check on" LeeAnn and gave him a key.

Miller entered LeeAnn's apartment and saw defendant, who was nude, withdraw his penis from LeeAnn's vagina. Miller exclaimed, "'What the hell are you doing?'" and told defendant that LeeAnn was "'only a little girl, 13 years old.'" Defendant said, "'She told me she was 21.'" Defendant put on his clothes and fled. Crystal B. testified that in July 1993, when she was 14 years old and had known defendant approximately two months, he drove to her home for the purpose of taking her to his mother's house to work and spend the night. When Crystal's younger brother got into the car with them, defendant told him there was not room enough because he was picking up other people. Defendant left with Crystal and drove to J&J Liquors, which was previously Circus Liquors. He asked Crystal if she wanted anything to drink and she replied, "'Okay.'" He bought a bottle of wine and then drove to a location across the street from where Crystal's cousin lived.

Crystal, who was not an experienced drinker, drank about one-half of the bottle of wine and became drowsy and light-headed. She told defendant she did not want any more; however, he told her to go ahead and drink it all and kept trying to get her to keep drinking. Crystal leaned back, "drifted off" and awoke when defendant began pulling on her

clothes. He had his pants down and was saying, "'Just give me five minutes.'" Although Crystal did not want to have sex with defendant, he forced her to engage in sexual intercourse. Crystal reported the incident to her cousin and then to the police. However, she and her mother decided going through a trial would be too stressful, so they declined to pursue the matter.

Defendant testified, admitting having been convicted of robbery in 1994. Defendant claimed he hardly knew Crystal and denied ever buying her liquor or having sexual intercourse with her, let alone raping her.

As to the incident with LeeAnn, defendant admitted he stopped his car near her, but did so because he thought she was someone else. He did not drive off because she seemed depressed. She got into his car because she needed someone to talk with. LeeAnn told him she drank and he drove to the liquor store where he purchased vodka for her and beer for himself. LeeAnn suggested they go to her home and defendant agreed, thinking they were going there to drink. Inside LeeAnn's apartment they talked and drank. They later went back to the liquor store because LeeAnn insisted on having more alcohol.

After buying more vodka, they returned to LeeAnn's apartment and again talked. LeeAnn told him she wanted to show him something in the bedroom, so they entered and sat on the bed and talked. They began kissing and eventually had sexual intercourse. Defendant denied intending to have sex

with LeeAnn either when he picked her up or when he went to her apartment.

DISCUSSION

I

Defendant claims the trial court erred in finding his prior juvenile adjudication for committing battery with serious bodily injury (§ 243, subd. (d))[1] constituted a strike. Relying on *People* v. *Griggs* (1997) 59 Cal.App.4th 557, as well as other arguments, the People contend to the contrary. Defendant has the better position.

Section 667(d)(3) provides in relevant part: "A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if: [¶] . . . [¶] (B) the prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony. [¶] . . . [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code." Paragraph (1) of section 667(d)(3)(B) refers to violent felonies listed in section 667.5(c) and serious felonies

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[1] Hereafter, subdivisions to Penal Code sections will be placed in parentheses immediately following the designated section; for example, section 243, subdivision (d) will be section 243(d).

listed in section 1192.7(c); paragraph 2 refers to offenses committed in other jurisdictions.

Following the filing of the briefs in this case, the California Supreme Court filed its opinion in *People* v. *Garcia* (1999) 21 Cal.4th 1, wherein it interpreted section 667(d)(3)(B) and (d)(3)(D). The court stated: "To summarize, we interpret section 667, subdivision (d)(3) according to its terms, without adopting any of the rewritings proposed by the parties and lower courts. Under paragraph (B), a prior juvenile adjudication qualifies as a prior felony conviction for Three Strikes purposes only if the prior offense is listed in Welfare and Institutions Code section 707(b) or is classified as 'serious' or 'violent.' Paragraph (D) does not modify or conflict with paragraph (B), but states a separate, additional requirement: the prior adjudication qualifies as a prior felony conviction only if the defendant, in the prior juvenile proceeding, was adjudged a ward because of at least one offense listed in section 707(b)." (*People* v. *Garcia*, *supra*, 21 Cal.4th at p. 13.) The court went on to state, "*People v. Griggs, supra,* 59 Cal.App.4th 557, which adopted a construction of section 667, subdivision (d)(3) inconsistent without ours, is disapproved."[2] (*Ibid*.)

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[2] Relying on *Griggs, supra,* 59 Cal.App.4th 557, the People argue we should view the Legislature's failure to expressly include section 243(d) within section 667(d)(3)(D) as a drafting oversight. However, in light of *Garcia's* express disapproval of *Griggs* on this point, we reject the argument.

Although section 243(d), battery with serious bodily injury, is not an offense specifically enumerated in Welfare and Institutions Code section 707, subdivision (b), the People argue section 243(d) comes within the catchall provisions of Welfare and Institutions Code section 707, subdivision (b)(14). Subdivision (b)(14) brings within its scope any "[a]ssault by any means of force likely to produce great bodily injury." Since "serious bodily injury" is equivalent to "great bodily injury," the People contend section 243(d) is an "[a]ssault by [any] means of force likely to produce great bodily injury."

The argument misses the point. While it is true that "serious bodily injury" and "great bodily injury" are equivalent terms (*People* v. *Burroughs* (1984) 35 Cal.3d 824, 831), this fact does not bring section 243(d) within Welfare and Institutions Code section 707, subdivision (b)(14). The critical distinction between section 243(d) and "assault by means of any force likely to produce great bodily injury" is whether the means employed was "likely" to result in great or serious bodily injury. Section 243(d) has no requirement that the injury be likely to occur, all that is required is that serious bodily injury actually occurs. For example, a defendant whose act of simply pushing another and thereby causing the latter to fall and suffer serious injury may be criminally liable under section 243(d) but not under, subdivision (b)(14) because the means used was not "likely" to result in great bodily injury. Consequently, we conclude

section 243(d) is not an offense described in Welfare and Institutions Code section 707, subdivision (b), and, therefore, is not a strike.

II

Prior to trial, the prosecutor sought to have Crystal's testimony relating defendant's sexual assault upon her admitted for the purpose of proving that his intent when he entered LeeAnn's apartment was to have sex with her, thereby establishing the burglary charge and the enhancement under section 667.61. In a hearing outside the presence of the jury, Crystal testified essentially as she did at trial. Following argument, the trial court concluded the evidence's probative value outweighed its prejudicial effect and was admissible under Evidence Code sections 1108 and 1101, subdivision (b).

Defendant contends admission of evidence regarding the assault on Crystal was reversible error because there were insufficient similarities between the charged and uncharged assaults to establish either intent or common scheme or plan, and the prejudicial effect substantially outweighed any probative value. We conclude the evidence was properly admitted.[3]

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[3] Although the trial court's pretrial ruling admitted the evidence under both Evidence Code sections 1108 and 1101, subdivision (b), during trial the prosecutor "elected to forego the uncharged conduct coming in under Evidence Code section 1108." Consequently, the parties have analyzed the ***[Continued]***

Evidence of uncharged crimes is admissible when offered to prove a fact such as intent, common design or plan, or identity with respect to the charged offense. (Evid. Code, § 1101, subd. (b).) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to [negate] accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance."'" (*People* v. *Ewoldt* (1994) 7 Cal.4th 380, 402.)

Defendant's intent was clearly material to establishing both the burglary charge (§ 459 -- entry with intent to commit a violation of section 288) and the enhancement (§ 667.61(d)(4) -- the violation of section 288 occurred during, and was the basis for, the burglary). Defendant met Crystal shortly before he assaulted her, and he met LeeAnn the night he assaulted her. Both girls were quite young, 13 and

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contention only under Evidence Code section 1101, subdivision (b). We will similarly limit our analysis, however, we note that in *People v. Falsetta* (1999) 21 Cal.4th 903, the Supreme Court upheld the constitutionality of Evidence Code section 1108.

14 years old. Defendant used a ruse to get each girl alone with him -- with Crystal he claimed there was not enough room in his car for her younger brother because he was picking up additional people, which he did not do; with LeeAnn it was to help him celebrate his twenty-first birthday, which it was not. Not only did he purchase alcohol for each girl, but he purchased it from the same location. Finally, he encouraged each girl to continue drinking to the point where she was unable to protect herself from his sexual assault.

Thus, if the jury believed Crystal's testimony, which clearly demonstrated an intent to get her alone and into an alcoholic stupor where he could sexually assault her, they could reasonably infer he had intent based upon his similar conduct with LeeAnn. Consequently, evidence of the uncharged offense against Crystal was properly admitted.

Defendant also contends that Crystal's testimony should have been excluded because it was substantially more prejudicial than probative. This is so, he argues, because the dissimilarities between the uncharged and charged conduct decreased the probative value of the uncharged conduct; since he was never charged with the incident involving Crystal, the jury would be tempted to find him guilty of the charged offense to ensure he was punished for the offense against Crystal; and because he had never been convicted of the offense against Crystal, the jury's attention was diverted to assessing his guilt of the uncharged incident, thereby leading to confusion of the issues. We are unpersuaded.

Establishing that defendant's intent in entering LeeAnn's residence was to sexually assault her was critical to proving the burglary charge and the enhancement. For reasons given above, we reject defendant's claim the incidents were dissimilar.

Nor was it likely that because defendant was never charged with, let alone convicted of, the offense against Crystal that the jury was either confused or inclined to convict him of the charged offense to punish him for the incident with Crystal. Crystal's testimony was relatively short and straightforward. The defense was similarly short and to the point. Thus, only a simple question of credibility was involved, and there was little likelihood for confusion of issues.

Finally, it is utter speculation that if the jury believed Crystal, but did not believe LeeAnn, that they would convict defendant of the charged offense in order to punish him for his assault on Crystal. Defendant points to nothing in the record to support this claim, and our review discloses no such support.

III

Defendant contends that use of his prior juvenile adjudication as a prior felony conviction under the Three Strikes law violates his constitutional right to a jury trial and to due process, that he was improperly sentenced under section 667(3)(2)(A)(i); and that his punishment was in violation of the constitutional prohibition against cruel and

unusual punishment. We need not address these issues since we are reversing the finding that his prior juvenile adjudication constituted a strike, vacating the sentence and remanding the matter for further sentencing proceedings.

DISPOSITION

The finding that defendant's prior juvenile adjudication for
battery with serious bodily injury (§ 243(d)) constitutes a strike is reversed. The sentence imposed is vacated and the matter remanded to the superior court for further proceedings.

(CERTIFIED FOR PARTIAL PUBLICATION.)

MORRISON, J.

We concur:

SCOTLAND, P.J.

SIMS, J.